

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2355-CR

Cir. Ct. No. 2013CF178

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIAN J. CANNON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Julian Cannon appeals a judgment convicting him of two counts of third-degree sexual assault as a repeater. He argues: (1) the circuit court improperly exercised its discretion when it allowed admission of other acts evidence; and (2) the circuit court denied Cannon representation by

counsel of his choice and his right of self-representation. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 Cannon was charged with sexually assaulting C.M.T., an adult woman with Down Syndrome. She testified Cannon had oral and anal intercourse with her without her consent.

¶3 Before trial, the State moved to admit other acts evidence, consisting of five charges of second-degree sexual assault of a child in 2005. After the circuit court granted the motion, the parties stipulated to the court informing the jury of the other crimes rather than having the victims testify. Pursuant to the stipulation, the court told the jury Cannon had been charged with five counts of sexual assault of a child for incidents occurring in 2005 with victims who were thirteen and fifteen years old, and had been convicted of four of the counts. The court also told the jury Cannon had been found guilty of incidents involving vaginal intercourse, and touching one of the victim's breasts and buttocks, but not guilty of anal intercourse.¹ The court cautioned the jury that it could consider this information only on the issue of motive, plan or scheme.

¶4 Immediately before trial, Cannon told the court he was not ready to proceed. He said he wanted a bench trial rather than a jury trial. When the State would not agree to a bench trial, Cannon asked if he could appeal the decision not

¹ The State was not required to prove the anal intercourse charge beyond a reasonable doubt for purposes of using that charge as other acts evidence. See *State v. Landrum*, 191 Wis. 2d 107, 119-20, 528 N.W.2d 36 (Ct. App. 1995).

to have a bench trial and asked to delay the trial. His attorney told the court Cannon might want to discharge him.

¶5 At the start of the second day of the trial, Cannon again said he wanted to discharge his defense counsel. He said he had \$2500 and could raise \$3000. He told the court, “Give me a lawyer for that.” He also asked if he could represent himself. The court denied the request to discharge counsel and found Cannon was not competent to represent himself.

DISCUSSION

Other Acts Evidence

¶6 Whether to admit other acts evidence is left to the circuit court’s discretion. *State v. Sullivan*, 216 Wis.2d 768, 780, 576 N.W.2d 30 (1998). Whether other acts evidence is admissible is determined under a three-step analysis. *Id.* at 772-73. First, the evidence must be offered for an acceptable purpose under WIS. STAT. § 904.04(2),² such as to prove motive, plan, or method of operation. *State v. Hurley*, 2015 WI 35, ¶61, 361 Wis.2d 529, 861 N.W.2d 174. Second, the evidence must be relevant—that is, evidence of consequence to the determination of the action, with a tendency to make a consequential fact or proposition more or less probable than it would be without the evidence. *Sullivan*, 216 Wis. 2d at 772, 785-86. Third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or waste of

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

time or needless presentation of cumulative evidence. *Id.* at 786-89. In sexual assault cases, a more liberal evidentiary standard (the greater latitude rule) applies to each prong of the *Sullivan* analysis. *State v. Hammer*, 2000 WI 92, ¶23, 236 Wis. 2d 686, 613 N.W.2d 629.

¶7 The circuit court properly applied the greater latitude rule in this case because C.M.T., although an adult, functions like a child because of her mental limitations. *See State v. Normington*, 2008 WI App 8, ¶¶17-19, 306 Wis. 2d 727, 744 N.W.2d 867. Applying the *Sullivan* analysis, the court properly admitted the evidence of Cannon's 2005 sexual assaults because, like the present case, they involved victims who were vulnerable due to their age or mental limitations and one of the incidents involved anal intercourse. The 2005 offenses were properly admitted to show Cannon's plan and method of operation. The evidence was relevant because it tends to establish his plan and method of operation. Finally, although the evidence was prejudicial, the circuit court properly concluded the evidence was not unfairly prejudicial. The danger of unfair prejudice was reduced by the giving of a cautionary jury instruction. The jury is presumed to follow the court's instructions. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶8 Cannon contends the evidence of the 2005 crimes was not admissible to show his plan or motive because neither plan nor motive is an element of the crimes with which Cannon was charged. Motive is not an acceptable purpose for introducing other acts where intercourse is charged because, unlike sexual contact cases, the defendant's motive or purpose is not relevant. *State v. Rushing*, 197 Wis. 2d 631, 646, 541 N.W.2d 155 (Ct. App. 1995). However, the law does not recognize any such limitation for showing a defendant's plan or method of operation. Other acts evidence has been admitted in

numerous sexual assault cases even though plan or method of operation is not an element. *See, e.g., State v. Friedrich*, 135 Wis. 2d 1, 24, 398 N.W.2d 763 (1987).

Cannon's Right to Representation by Counsel of His Choice or Self-Representation

¶9 Cannon's initial attorney withdrew, citing a breakdown in the attorney-client relationship. When Cannon stated his desire to fire his second attorney in the middle of the trial and hire a private attorney, the circuit court denied the request. Because discharging Cannon's attorney would have necessitated a continuance, the circuit court's decision on that request is committed to the circuit court's discretion, which we will reverse only if that discretion has been erroneously exercised. *See State v. Oswald*, 2000 WI App 3, ¶31, 232 Wis. 2d 103, 606 N.W.2d 238. Factors the court should consider when a defendant seeks new counsel include the length of the delay requested; whether competent counsel is presently available and prepared to try the case; whether prior continuances have been requested and received by the defendant; the inconvenience to the parties, witnesses and the court; and whether the delay seems to be for legitimate reasons or whether its purpose is dilatory. *State v. Lomax*, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988). All of these factors support the circuit court's discretionary decision.

¶10 Cannon had not retained alternative counsel. The court would have had to declare a mistrial to give Cannon an opportunity to find replacement counsel and allow replacement counsel substantial time to become familiar with the case. Retrying the case would be inconvenient to the witnesses and potentially traumatic for the victim. The request was made after Cannon repeatedly attempted to delay the trial. He attempted to delay the trial by saying he was short of breath because his clothes did not fit. He said he would not have enough time to talk to

his attorney and he needed more time to do research, although he could not identify a specific issue that required more research. He requested a stay so he could appeal the State's refusal to consent to a bench trial. Because the delay would frustrate the orderly and efficient administration of justice, the court properly denied the request to substitute counsel. *See id.*

¶11 The court also properly exercised its discretion when it denied Cannon's request for self-representation based on its finding that Cannon was not competent to represent himself. *See State v. Marquardt*, 2005 WI 157, ¶60, 286 Wis. 2d 204, 705 N.W.2d 878; *Hamiel v. State*, 92 Wis. 2d 656, 672-73, 285 N.W.2d 639 (1979). When Cannon argued in the circuit court that he was competent to represent himself, he falsely equated competency to stand trial with competency for self-representation.

¶12 Cannon's own words and behavior demonstrated his lack of competency to represent himself. Before the trial began, Cannon repeatedly told the court he was not ready to be tried. He said he was short of breath, stressed, and had high blood pressure, high blood sugar and a fever. He told the court he did not want to be present for his trial.

¶13 On the second day of trial, he refused to change from jail clothes to street clothes, claiming the street clothes hurt his stomach and he had a hard time breathing. When discussing the sentence imposed after revocation of his extended supervision, he said, "It ain't a day goes back where I don't think about killing myself." He also said he was "not in the right state of mind," and "I'm not stressing out. I just—I will freak out at any moment when I feel like I am being mistreated." During the discussion about wearing street clothes, Cannon said, "I'm trying to make it where I don't get to hollering and screaming in front of

these people. ... I don't think I'm going to make it five years. The first chance I can get this shit over. So I could care less, honest to God.” After Cannon met with his attorney he told the court, “I don't want to make an argument or fuss on you all or make myself look crazy to the—to the jury, but I have been off my psych meds my whole bit because I am trying to do things on my own.” He also said he had “difficulty reading.”

¶14 Cannon's disjointed thought process became evident when he said he wanted to question the victim about the sexual assaults, but then began talking about his treatment while incarcerated, discussing the procedure for having his fingernails cut, and accusing corrections officers of “messing with [his] food.” The record supports the circuit court's finding that Cannon was not competent to represent himself.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

